82-1196

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GERTRUDE BARNSTONE and HARVEY MALYN,
Petitioners

V.

UNIVERSITY OF HOUSTON, KUHT-TV
and
PATRICK J. NICHOLSON,
Respondents

BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Counsel of Record

MARY F. KELLER
Assistant Attorney General

Attorneys for Respondents
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-6139

February, 1983

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REASONS FOR DENYING THE WRIT

The petitioners concede, and the Fifth Circuit Court of Appeals en banc so held, that public broadcasters must be allowed a broad degree of editorial discretion. Whether the right of editorial discretion is rooted in the First Amendment, Community Service Broadcasting v. FCC, 593 F.2d 1102 (D.C. Cir. 1978), or specific Congressional enactments, Public Broadcasting Act of 1967, is immaterial. As the en banc court noted:

> This lack of constitutional protection implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees. The lack of First Amendment protection does not result in the lessening of any of the statutory rights and duties held by the public licensees.

> It also does not result in individual viewers gaining any greater right to influence the programming discretion of the public licensees.

688 F.2d at 1041. In fact, the court's holding that the right of editorial discretion for public broadcasters is statutorily conferred strengthens respondents' opposition to certiorari because, absent First Amendment protection, Congress could have imposed the very restrictions petitioners seek from this Court.

Petitioners urge this Court balance this recognized right of editorial independence against the competing First Amendment right of viewers to "nonpolitical" programming by imposing judicial scrutiny of any programming decision alleged to be "substantially politically motivated." The writ of certiorari should be denied because petitioners seek a remedy without a right. The en banc court of appeals

specifically and correctly held that Congress, in enacting the Public Broadcasting Act of 1967, had already balanced the competing interests of viewers and broadcasters in favor of programming independence, subject to review by the FCC. The writ of certiorari should also be denied because petitioners have failed to establish a violation of the very rights they allege. The concurring judges specifically found that the University of Houston's decision not to show "Death of a Princess" was not sufficient to establish "politically motivated" programming. 688 F.2d at 1053 and 1061.

I. PETITIONERS DO NOT HAVE A CONSTITUTIONAL RIGHT TO "NONPOLITICAL" PROGRAMMING.

The en banc court of appeals carefully discussed the statutory regulations under which the University of Houston

operates its public broadcasting station. The court found that:

> Public television licensees are generally subjected to the same regulatory requirements as their commercial counterparts. See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed. 2d 175 (1976). Thus the FCC, in its demand for unfettered license control over programming has made no distinction between private and public licensees. City of New York Municipal Broadcasting System, 56 F.C.C. 2d 169 (1975).
>
> The Public Broadcasting Act of 1967 enacted by Congress to provide financial assistance for programming and the operations of public broadcasters further illustrates a Congressional desire that public broadcast licensees retain independent programming responsibility.

688 F.2d at 1040. The court recognized that many editorial decisions can be characterized as "politically motivated" and that any standard requiring "non-

political" programming "would render virtually every programming decision subject to judicial challenge." 688 F.2d at 1044. The court also recognized that the very duty of public broadcasters included covering political events and providing programs dealing with the political, social, economic and other issues which concern their community. 688 F.2d at 1044.

Petitioners attempt to constrain public broadcasting in ways similar to public libraries, newspapers and auditoriums. However, the en banc court of appeals realized that public broadcasting stations, by regulation and design, are sui generis. Unlike many public libraries, newspapers and auditoriums, the public broadcasting station operated by the University of Houston is not designed to function as a

market place of ideas. 688 F.2d at 1052 (Rubin, J. concurring). It serves instead "a diet that differs from commercial television primarily in appeal to a somewhat more sophisticated audience, the absence of commercials, and efforts to raise funds from viewers." 688 F.2d at 1050 (Rubin, J. concurring). The broadcast station is limited by time and resources to the number of programs which may be shown. 688 F.2d at 1045. And, public broadcasting has been carefully and extensively regulated by Congress, with avenues of complaint to the FCC for violation of the public trust. 688 F.2d at 1046. Perhaps, as Judge Garwood suggests in his concurring opinion, the public should not operate broadcasting stations or, when they do, they should be a pure "open forum".

688 F.2d at 1062. However, these issues are for resolution by Congress, not the courts.

II. THE UNIVERSITY OF HOUSTON'S DECISION NOT TO SHOW "DEATH OF A PRINCESS" DOES NOT ESTABLISH A "POLITICALLY MOTIVATED" PROGRAMMING POLICY.

Petitioners do not assert that the University of Houston has structured its programming so as to present one political point of view. In fact, in its thirty year history, the University of Houston has never been charged either in court or with the FCC of politically motivated programming. Petitioners, instead, make their complaint, "in a vacuum". 688 F.2d at 1061. (Garwood, J. concurring). While petitioners agree that viewers do not have a right to compel broadcast of particular programs, Petition for Writ of Certiorari at 28, that is the only issue before this Court.

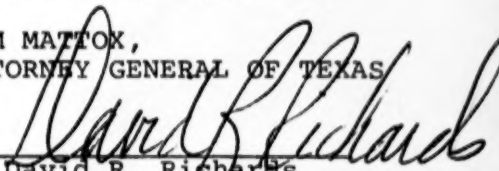
Surely, the First Amendment does not dictate that every programming decision, in isolation, be without any political considerations. 688 F.2d at 1050. (Rubin, J. concurring). To require such would be the death of public broadcasting.

CONCLUSION

For these reasons, this Court should deny the writ of certiorari.

Respectfully submitted,

JIM MATTOX,
ATTORNEY GENERAL OF TEXAS

By 
David R. Richards

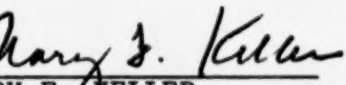
Executive Assistant
Attorney General
Counsel of Record

Mary F. Keller
Assistant Attorney General
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711
(512) 475-6139

February 11, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1983, a copy of the Brief in Opposition was mailed, postage prepaid, to David H. Berg & Associates, 3702 Travis, Houston, Texas, 77002.



MARY F. KELLER
ASSISTANT ATTORNEY GENERAL,
ATTORNEY GENERAL OF THE STATE OF TEXAS
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-6139